NTSB Order No.
EM-8

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the National Transportation Safety Board
at its office in Washington, D. C.,
on the 23rd day of October, 1969.

WILLARD J. SMITH, Commandant, United States Coast Guard

vs.

PATRICK OWENS

Docket ME-5

OPINION AND ORDER

The appellant, Patrick Owens, had appealed to this Board from the decision of the Commandant, affirming an order revoking his seaman's documents entered by Coast Guard Examiner Tilden H. Edwards.[1] The action of the Commandant was taken after the appellant had appealed to him (Appeal No. 1706) to set aside the examiner's initial decision and remand the case for further consideration of appellant's mental condition.

Proceedings in this case began when appellant was summoned to appear for a hearing before the examiner in San Francisco, charged with misconduct in the course of his employment as an oiler aboard the SS METAPAN and as an ordinary seaman of the SS TRANSPACIFIC. Neither appellant nor any representative in his behalf appeared at the appointed time and place, but a friend of appellant telephoned the local Coast Guard office that "he had to be out of town and would contact the Coast Guard within 24 hours." (Tr. p. 1.) The examiner rescheduled the hearing for the following day to accommodate the appellant. However, when he again failed to appear and the Coast Guard reported "no word whatsoever" from him during the 24-hour interval, the examiner proceeded with the hearing in appellant's absence. (Tr. p. 2)[2]

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[1]This Board is authorized to review on appeal revocation actions of the Commandant under 49 U.S.C. 1654 (b) (2). Rules of procedure for appeals to the Board from decisions of the Commandant are set forth in 14 C.F.R. Part 425.

[2]Coast Guard hearing regulation, 46 CFR 137.20-25 (a), provides that: "In any case in which the person charged, after

The Coast Guard established its case with copies of extracts from shipping articles and logbooks of the two vessels, certified as true facsimiles of their original voyage records in accordance with Coast Guard regulations.[3] From logbook entries of the METAPAN, it was shown that appellant had failed to perform regularly assigned duties (to stand watch) on 9 days, that the had abandoned his watch on another day, and that he finally deserted the vessel 10 minutes prior to her departure from the port of Saigon, Republic of Vietnam. All of these offenses occurred in a time span of 11 days. The METAPAN during this period spent the first 5 days in the port of Qui Nhon, R.V.N. the sixth day at sea proceeding to Saigon, and the next 4 days in port there before leaving on the morning of the eleventh day.

Voyage records of the TRANSPACIFIC showed that several weeks after deserting the METAPAN, appellant had signed shipping articles in Saigon for a voyage to San Francisco. Logbook entries of the TRANSPACIFIC indicated that the U. S. Consul in Saigon had arranged for appellant's employment, presumably so that he could be repatriated, but that appellant failed to join the vessel on her departure from Vang Tau, Vietnam.

In reviewing the case presented against appellant, as evidenced by these log entries, the single issue considered by the examiner in appellant's defense was his claimed sickness aboard the METAPAN, which was reflected by his recorded replies at the various time log entries were read to him aboard the vessel as prescribed by law.[4] The logging of his acts of non-performance at Qui Nhon

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being duly served with the original of the notice of the time and place of the hearing and the charges and specifications, fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the record and the hearing may then be conducted 'in absentia'."

[3]46 CFR 137.20-106.

[4]46 U.S.C. 702 provides that: "Upon commission of any of the offenses enumerated in section 701 of this title and entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that

recorded his reply as: "I was in no condition to stand watches until I see a doctor - psychiatry." To the next offense entered in the log while the METAPAN was at sea, appellant's response was: "I have no glasses to stand watch--have to see the gauges." On the day after the vessel reached Saigon, a log entry states that appellant "requested master's medical certificate to go to the doctor." The following day, when questioned about the doctor's certificate, he handed the master a U. S. Army health record which stated: "Patient states as he would go see a civilian doctor because of having to wait." Respecting the log entries of his failures to perform duties at Saigon, appellant replied: "I am a sick man."

The log entry concerning appellant's desertion of the METAPAN states: "10 minutes before sailing PATRICK OWENS, Z-70527-D2 handed Captain a 'Fit for sea duty certificate signed by a U. S. Army doctor. He then stated. . . that he would not sail with the ship. He was worried that if he walked off it would be desertion. He said the would leave his clothes on board. He then walked down the gangway and is hereby a deserter."

The examiner took the view that appellant's log entry replies were not sufficient in and of themselves to support a finding that sickness excused his acts of misconduct. He held that the burden of proof as to such sickness rested with appellant and that, having absented himself from the hearing, he had failed to sustain it with the "meagre evidence of sickness" represented by the statements attributed to him in the log entries.

The examiner regarded the log entries as prima facie proof of the offense stated therein and concluded that the charge of misconduct against appellant had been proved. Considering appellant's prior record of a suspension in 1966 and admonitions in 1962 and 1963 for offenses of the same type, the examiner decided that "the only appropriate order that can be entered in this case is revocation."

In his appeal to the Commandant, having belatedly secured the services of counsel, appellant raised no issue over the examiner's findings and conclusions concerning his misconduct. No question was presented as to deprivation of rights in holding appellant's hearing in absentia; nor was any excuse offered for appellant's failure to appear. The sole basis for appeal was stated as

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a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner."

follows: "The seaman has a very severe mental problem and has had the problem for a number of years. He is a definite psychiatric case and, in fact, has now been declared permanently unfit for duty by the United States Public Health Service Hospital in Seattle, Washington, because of his mental condition." On this basis, appellant requested that the examiner's initial decision be remanded for receipt of further medical evidence concerning his mental condition.

Appellant filed with the Commandant authenticated copies of medical records of the Seattle hospital, covering his 13-day period of hospitalization. The records show that he was admitted to this hospital approximately 1 month after the date of the hearing (and 12 days after being served with the examiner's initial decision), complaining of dizziness and depression. The clinical record indicates that upon entering the hospital he stated that he was hearing voices of long dead friends, that he had the feeling that his body was shrinking, and that he was going to commit suicide. He also stated that the drank to excess.

The course of treatment administered to appellant and the diagnosis made of his mental condition were described in a narrative summary of his clinical record, prepared by Kenneth Behymer, M.D., as follows:

> "HOSPITAL COURSE: The patient was placed on thorazine 100 mg four times a day and improved rapidly. Later in the hospitalization a better history was obtained and it was found that the patient had been in a chronic state of schizophrenia for at least three years and has not done well at being a seaman. He was seen in consultation with Dr. Kovel who feels that this man does suffer from a state of chronic schizophrenia and that going to sea is considerable stress for him and would probably cause him to get in trouble. Dr. Kovel has recommended that this man be considered permanently not fit for sea duty and I agree with that recommendation and accordingly recommend such. He does seem to have reached a maximal state of benefit from this hospitalization. His most recent dose of thorazine is 50 mg four times a day and he is discharged taking that medicine only. He intends to visit friends in the San Francisco area and so he was given no followup appointment here. His prognosis is poor.
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> DIAGNOSIS: 1. SCHIZOPHRENIA, paranoid."

In view of this diagnosis and medical opinion that the affliction of schizophrenia subsisted for at least 3 years prior

thereto, the Commandant was urged to remand this case for the purpose of receiving further medical evidence as to appellant's mental competency. It was further urged in view of this diagnosis that appellant should not "rightfully be held responsible for his actions and . . . that the decision be reversed on that ground, inasmuch as if he should recover, which appears doubtful, he would then still be able to earn a living as a seaman, whereas under the order of the examiner, he would undoubtedly lose his papers forever because of activities for which he should not rightfully be held responsible."

The Commandant held that the examiner on remand would have the option, among others, of dismissing the misconduct charge against appellant and revoking his seaman's documents solely on the ground of his mental incompetency. He decided that no useful purpose would be served by this procedure, pointing out that Coast Guard regulation 46 C.F.R. 137.13-1 (b)[5] would allow appellant to apply for a new document after 1 year of revocation. In addition, the Commandant expressed reluctance to remand the case for the examiner's determination of appellant's mental condition, since the hearing of "an issue not directly placed before him (but upon which he heard evidence), when appellant chose to absent himself from the hearing would open the door to so many possibilities as to frustrate the hearing procedure completely."

On appeal to this Board, appellant's counsel concedes that he has no defense to the offense charged other than the medical evidence submitted in the first instance on appeal to the Commandant. However, the fact that appellant had the capacity to understand the nature of his action is disputed in view of this medical evidence, which shows that appellant's mental disability prevailed at the time his offenses were committed. In seeking a remand to determine the issue of his mental disability, appellant calls attention to certain employment, social, and legal disabilities that would be visited upon him if the present revocation remains undisturbed. He asserts that "it is important the [appellant] have his documents revoked for the right reasons."

Under all the circumstances of this case, we are persuaded to grant the relief requested by the appellant. His unexplained failure to attend the examiner's hearing would ordinarily

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[5]46 C.F.R. 137.13-(b), provides that: "Any person whose license, certificate or document has been revoked or surrendered for one or more offenses which are not specifically described in Sections 137.03-3 and 137.03-5 may after one year apply by letter and the application form requesting the issuance of a new license, certificate or document."

disincline the Board to accept his present cause as meritorious. From all that appears in the record, his notice of hearing was adequate and he was personally apprised by the Coast Guard investigating officer of the complaints made against him, the nature of the proceedings, and his right to representation by counsel. He nonetheless chose to ignore the Coast Guard summons to appear at the hearing.

It now appears, that appellant's irresponsible conduct aboard the vessels and his disregard of the hearing summons may be the product of serious mental illness. In his brief to this Board, appellant's counsel contends that it constituted error on the examiner's part to revoke appellant's documents without first ordering a medical examination to determine his physical and mental condition. The examiner has discretion to order a medical examination in a hearing "in which the physical or mental condition of the person charged is in controversy, to be administered by a physician of the U. S. Public Health Service." This authority is set forth in Coast Guard regulations 46 C.F.R. 137.20-27.

We do not agree from our review of the record that the need for a medical examination of appellant was made apparent to the examiner.The shipboard records of appellant's misconduct and statements of sickness reflected therein would be wholly insufficient to show appellant's schizophrenic tendencies. They could just as reasonably be read as indications of malingering conduct. Other documents and references in the record concerning appellant's mental condition were inconclusive or tended to show he was medically fit for duty.

However, the Commandant and the Board have now been appraised of medical information regarding appellant's mental condition, which was not presented to the examiner, but which shows a present and pre-existing mental disorder that should, if presented, have received very serious consideration by the examiner in coming to this initial decision. Coast Guard hearing regulations provide for the reopening of hearings "when new evidence is described which has a direct and material bearing on the issues, and when valid explanation is given for the failure to produce this evidence at the hearing."[6] Appellant's mental distress as described by physicians of the U. S. Public Health Service would clearly serve as a cogent explanation of his failure to appear or produce evidence at the hearing. We fail to understand how the Commandant's remand to the examiner with instructions to reopen the hearing for submission of this new evidence would disrupt established hearing procedure.

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[6]46 C.F.R. 137.25-10(b).

In light of the new evidence presented on appeal to the Commandant and the Coast Guard regulation quoted above, this Board believes a remand to the examiner was and is required as a matter of administrative due process.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted;

2. The decision of the Commandant in Appeal No. 1706 be and it hereby is set aside; and

3. The record in this proceeding is reopened and the matter remand to the Commandant for further proceedings in accordance with this opinion.

REED, Chairman, and LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)